

The Behind Closed Door Policy: Executive Influence in the Environmental Protection Agency's Informal Rulemaking

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Introduction

IN 2011, THE ENVIRONMENTAL PROTECTION AGENCY (“EPA”) concentrated its efforts on reducing ozone standards throughout the United States. The lower standards were controversial—pitting environmentalists against businesses. The agency worked diligently to consider every opinion on the potential regulation. On the eve of promulgating the new, lower standards, the Obama administration requested that the EPA delay issuing the final rule—the agency obliged.¹ Executive influence over agency rulemaking is common, but is it desirable?

Since the last century, the United States Government has used federal administrative agencies to create and oversee regulations in support of larger congressional legislation.² Over time, statutes and

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1. Letter from Cass Sunstein, Admin. of the Office of Info. & Regulatory Affairs, Exec. Office of the President, to Lisa Jackson, Admin. of the Env'tl. Prot. Agency (Sept. 2, 2011) [hereinafter Sunstein Letter], available at http://www.whitehouse.gov/sites/default/files/ozone_national_ambient_air_quality_standards_letter.pdf.

2. “Given the limited amount of time that Congress as an institution can devote to any particular area of public policy, Congress relies on agencies—as repositories of technical expertise—to flush out the details of the regulatory framework after exhaustive investigation and analysis.” Richard A. Nagareda, *Ex Parte Contracts and Institutional Roles: Lessons From the OMB Experience*, 55 U. CHI. L. REV. 591, 593 (1988). For example, the Department of Transportation was established by statute to, among other things, develop national transportation policies and programs conducive to the provision of fast, safe, efficient and

judicial interpretation have required an administrative agency to navigate a variety of transparency-driven procedural requirements in order to promulgate any regulation.³ However, with the establishment of the Office of Management and Budget (“OMB”) under the executive branch, the executive appears to have the final say on the outcome of regulations⁴ regardless of whether the promulgating agency followed all of its own procedural requirements.

Executive influence over the rulemaking function of administrative agencies has been a problem since the establishment of the OMB.⁵ After an agency expends large amounts of time and resources researching, promulgating, and ultimately preparing a final rule in the public domain (with public assistance), the executive can require an agency to reverse itself without providing any substantive explanation. If the public, Congress, and the judiciary were to demand transparency in rulemaking for administrative agencies, the executive should be held to the same standard when directly interfering with an agency’s activities.

I. Legal Background: Administrative Agency Rulemaking Procedures

Administrative agencies use a process called rulemaking when issuing regulations.⁶ The rulemaking process can be done formally or informally. This case study focuses on informal rulemaking, the minimum requirements of which can be found in the Administrative Procedure Act (“APA”): (1) a “[g]eneral notice of proposed rule making . . . published in the Federal Register”; (2) notice and comment, which allows “interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation”; and (3) “publication or service of a substantive rule be made not less than 30

convenient transportation at the lowest cost. Act of Oct. 15, 1966, Pub. L. No. 89-670, 80 Stat. 931 (establishing the Department of Transportation).

3. See *infra* Part II.

4. The OMB acts “[a]s the implementation and enforcement arm of Presidential policy government-wide” and its duties include “[c]oordination and review of all significant Federal regulations by executive agencies, to reflect Presidential priorities and to ensure that economic and other impacts are assessed as part of regulatory decision-making, along with review and assessment of information collection requests.” *The Mission and Structure of the Office of Management and Budget*, WHITE HOUSE, http://www.whitehouse.gov/omb/organization_mission/ (last visited Apr. 16, 2013) [hereinafter *Mission of the OMB*].

5. See Nagareda, *supra* note 2, at 604–606.

6. Administrative Procedure Act, 5 U.S.C. §§ 551(5), 553, 556, 557 (2006).

days before its effective date”⁷ The APA only requires that the agency provide “a concise general statement of [the rule’s] basis and purpose.”⁸ Although anyone can participate in the notice and comment period during informal rulemaking, it typically involves only those persons or organizations with a stake in the outcome of the rule.⁹ The final promulgated rule does not have to mirror the majority of comments provided to the agency as long as there is a general and concise statement of the rule’s basis and purpose.¹⁰ As a result, political maneuvering occurs in this period of limbo (post-notice and comment but pre-final rule promulgation).¹¹ All too often, ex parte meetings and communications between interested parties (including the President, private industry representatives, and interest group representatives) and the agency occur during the period of limbo.¹² The APA defines ex parte communications as “an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given”¹³ Though Congress and the courts have strictly limited ex parte communications in administrative adjudications,¹⁴ there have been few limitations on ex parte communications in informal rulemaking.¹⁵

Additional restrictions on the executive’s ex parte communications during the informal rulemaking process should be imposed because these communications often wield enormous influence over the final rule. Private industry and interest groups submit comments to the rulemaking agency during the designated period for informal

7. *Id.* §§ 553(b)–(d).

8. *Id.* § 553(c).

9. According to the Office of the Federal Register, “[a]nyone interested (individuals or groups) may respond to [the agency] by submitting comments aimed at developing and improving the draft proposal or by recommending against issuing a rule.” OFFICE FED. REGISTER, A GUIDE TO THE RULEMAKING PROCESS (2011), available at https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf.

10. 5 U.S.C. 553(c).

11. An agency is not permitted to base its final rule on the number of comments in support of the rule over those in opposition to it. At the end of the [notice and comment] process, the agency must base its reasoning and scientific conclusions on the rulemaking record, consisting of the comments, scientific data, expert opinions, and facts accumulated during the pre-rule and proposed rule stages. *Id.*

12. Note, *Due Process and Ex Parte Contacts in Informal Rulemaking*, 89 YALE L.J. 194, 194 (1979) (“Ex parte communications-off-the-record contacts between administrative agencies and parties to agency proceedings”).

13. 5 U.S.C. § 551(14) (2006).

14. *Id.* § 557(d)(1)(A). Administrative adjudications are similar to court proceedings, and occur when required by statute. *Id.* § 554 (2006).

15. See *infra* Part II.

rulemaking,¹⁶ even if they also participate in *ex parte* communications. In contrast, the executive does not submit any comments during the designated period, so the general public is unaware, and cannot even speculate, as to the content of its communications with the promulgating agency.¹⁷ Such secrecy in the informal rulemaking process is unacceptable because Congress clearly intended to make public comment and input a vital aspect of informal rulemaking.¹⁸ If the executive has the ability to override these procedures without explanation or transparency, then why have such procedures in the first place?

The “executive” for the purposes of this paper, and unless otherwise indicated, refers to the Executive Office of the President,¹⁹ and includes the OMB and the Office of Information and Regulatory Affairs (“OIRA”) within the OMB, top executive aides, and the President himself (though the President is involved only in the most rare circumstances). These players use their relationships with administrative agencies to promote the President’s policy.²⁰ Also, the use of “*ex parte*” within this paper refers to communications or meetings between the executive, the agency, and any third parties (usually private industry and interest group representatives). Finally, a comment includes any written or oral submissions regarding the proposed rule, and can be submitted on *Regulations.gov*, or by email, fax, mail, hand delivery or by speaking at public hearings.²¹ Comments are not within the definition of “documents”, which includes any memoranda, summaries, handouts, PowerPoint presentations, or any other relevant document (e.g. an email follow-up) from a meeting that has been included in the docket on *Regulations.gov*.²² However, meetings whose participants solely come from within the EPA are excluded from the calculation of documents.²³

16. See *infra* Part IV.A.

17. See *infra* Part IV.B.

18. See 5 U.S.C. § 553(c).

19. See *Executive Office of the President*, WHITE HOUSE, <http://www.whitehouse.gov/administration/eop> (last visited Apr. 16, 2013).

20. See, e.g., *Mission of the OMB*, *supra* note 4.

21. National Ambient Air Quality Standards for Ozone, 75 Fed. Reg. 2938 (Jan. 19, 2010) (to be codified at 40 C.F.R. §§ 50, 58).

22. See, e.g., *Review of the National Ambient Air Quality Standards for Ozone*, REGULATIONS.GOV, <http://www.regulations.gov/#!docketDetail;D=EPA-HQ-OAR-2005-0172> (last visited Apr. 16, 2013) [hereinafter *Review of Air Quality Standards*].

23. Meetings whose sole participants work for the EPA are not relevant to the analysis within this paper, which focuses specifically on meetings with extra-agency participants. In fact, intra-agency meetings are exactly what Congress contemplated would occur during

Part II explores the legal background on the issue of ex parte communications in informal rulemaking. Part III provides a case study of the influence of ex parte communications by the executive on agency rulemaking.²⁴ Part IV explains the effects these communications had on the outcome of the rule, and then analyzes why executive contacts should be more strictly controlled than private industry or interest group contacts. Part V proposes a solution to the problem of executive branch ex parte communications.

While numerous articles²⁵ have suggested that there should be regulations or restraints on ex parte communications with administrative agencies during the informal rulemaking process, this case study focuses specifically on why the executive should be restrained by illustrating how dramatically the executive can influence agency rulemaking.

II. The Judicial Branch's Historical Treatment of Ex Parte Communications Between the Executive and Administrative Agencies

The case law on ex parte communications has been discussed in a number of articles.²⁶ In 1946, Congress passed the APA, detailing federal administrative agency procedures in formal and informal rulemaking and adjudication.²⁷ The procedures for informal rulemaking can be found in section 553 of the APA.²⁸ While informal rulemaking has three requirements,²⁹ what is most critical for the purposes of this case study, is the period beginning with the start of the

the rule making process, as the Administrator makes a policy judgment based on competing interests. See *infra* Part III.

24. In September 2011, the Obama administration asked the EPA to delay issuing a final rule on the reconsideration of ozone reduction standards. See Sunstein Letter, *supra* note 1 and accompanying text. This Comment aims to provide a detailed portrait of how ex parte communications by the executive branch altered the fate of this controversial and important rule. See *infra* Part III.

25. See, e.g., Michael A. Bosh, *The "God Squad" Proves Mortal: Ex Parte Contacts and the White House After Portland Audubon Society*, 51 WASH. & LEE L. REV. 1029 (1994); Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533 (1989); Nagareda, *supra* note 2; Gregory Brevard Richards, *Administrative Law—Ex Parte Contacts in Informal Rulemaking Under the Administrative Procedure Act*, 52 TENN. L. REV. 67 (1984).

26. See Sherry Iris Brandt-Rauf, *Ex Parte Contacts Under the Constitution and Administrative Procedure Act*, 80 COLUM. L. REV. 379 (1980); Richards, *supra* note 25; Paul R. Verkuil, *Jauboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943 (1981).

27. See generally Administrative Procedure Act, 5 U.S.C. §§ 551–557 (2006).

28. *Id.* § 553; Richards, *supra* note 25, at 67.

29. 5 U.S.C. §§ 553(b)–(d).

comment period and ending with the issuance of the final rule by the agency. The comment period allows “interested persons [the] opportunity to participate in rule making,”³⁰ most commonly through *Regulations.gov*,³¹ however not all parties play by the book.³² Members of government and private industry often engage in ex parte communications with the promulgating agency during and outside of the comment period.³³ While section 557(d)(1) of the APA³⁴ prohibits ex parte communications in formal rulemaking procedures, it provides no such limitations on informal rulemaking procedures.³⁵ “The traditional conception of rulemaking as an informal, ‘quasi-legislative’ activity has made unrecorded ex parte contacts seem permissible[, and] Congress has declined to amend the APA to alter that view.”³⁶

Over the years, the D.C. Circuit has heard and adjudicated almost all challenges to agency actions, and has issued inconsistent rulings on how administrative agencies should handle ex parte communications during informal rulemaking. The first major case to consider the propriety of ex parte communications in informal rulemaking was *Sangamon Valley Television Corp. v. United States*.³⁷ In *Sangamon Valley*, the Federal Communications Commission (“FCC”) began the notice and comment period for a rule amending the Table to Television Channel Assignments, affecting the allocation of television channels between communities.³⁸ An interested party made ex parte presentations to members of the FCC, took the commissioners to lunch, and sent letters to the Commission that were not included in the public record

30. *Id.* § 553(c).

31. Regulations.gov is the public’s source for information on the development of federal regulations and through this site the public can find, read and comment on regulatory issues. See *Frequently Asked Questions*, REGULATIONS.GOV, <http://www.regulations.gov/#!faqs;qid=6-9> (last visited Apr. 16, 2013).

32. Ted Steichen, *Comment from Public Hearing on Review of National Ambient Air Quality Standards for Ozone*, REGULATIONS.GOV (Feb. 2, 2010), <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2005-0172-10396>; *accord Attendance List for August 19, 2010 Ozone NAAQS Teleconference between USEPA, API, Hunton and Williams, Kirkland and Ellis LLP, and Department of Justice*, REGULATIONS.GOV, <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2005-0172-12963> (last visited Apr. 16, 2013).

33. Steichen, *supra* note 32.

34. “The Sunshine Act provides . . . that ‘every portion of every meeting of an agency shall be open to public observation.’ 5 U.S.C. § 552b(b).” *Natural Res. Def. Council, Inc. v. Nuclear Regulatory Comm’n*, 216 F.3d 1180, 1182 (D.C. Cir. 2000).

35. 5 U.S.C. § 557(d)(1). Informal rulemaking is not discussed anywhere in the Sunshine Act as it relates to ex parte communications.

36. *Bruff*, *supra* note 25, at 587.

37. 269 F.2d 221 (D.C. Cir. 1959).

38. *Id.* at 223–24.

after the comment period had ended.³⁹ The D.C. Circuit held that these ex parte communications invalidated the agency action because basic fairness required the proceedings to be conducted openly.⁴⁰

Less than twenty years later, the D.C. Circuit revisited the applicability of the *Sangamon Valley* ex parte communications rule in *Home Box Office, Inc. v. FCC*.⁴¹ In 1975, the FCC issued rules that “regulat[ed] and limit[ed] the program fare ‘cablecasters’ and ‘subscription broadcast television stations’ [could] offer to the public for a fee set on a per-program or per-channel basis.”⁴² An amicus brief filed during the proceedings alerted the court to the possibility of improper ex parte communications between the FCC and “a number of participants . . . for the purpose of discussing ex parte and in confidence the merits of the rules” issued by the FCC.⁴³ The D.C. Circuit held:

[C]ommunications which are received prior to issuance of a formal notice of rulemaking do not, in general, have to be put in a public file . . . [unless] the information contained in such a communication forms the basis for agency action Once a notice of proposed rulemaking has been issued, however . . . any written document or a summary of any oral communication must be placed in the public file established for each rulemaking docket immediately after the [ex parte] communication is received so that interested parties may comment thereon.⁴⁴

Home Box Office required the content of any ex parte communications be available to the public so that other interested parties would have an opportunity to respond to such communications.⁴⁵ Four months later in *Action for Children’s Television v. FCC*,⁴⁶ the D.C. Circuit limited this all-inclusive ex parte disclosure rule by requiring agencies to make public only those ex parte communications involving “‘competing claims to a valuable privilege’⁴⁷ . . . where the potential for

39. *Id.* The interested party also testified that he gave each Commissioner a turkey during the years 1955 and 1956, though the court did not put extra emphasis on the gifts in analyzing the ex parte communications, and instead categorized them with the other communications. *Id.*

40. *Id.* at 224. (“[B]asic fairness requires [rule making] . . . to be carried on in the open.”).

41. 567 F.2d 9 (D.C. Cir. 1977).

42. *Id.* at 17 (footnotes omitted).

43. *Id.* at 51.

44. *Id.* at 57.

45. *Id.*

46. 564 F.2d 458 (D.C. Cir. 1977).

47. Rules involving “a valuable privilege” require disclosure, as opposed to general policymaking rules, which do not. *Id.* at 477. The D.C. Circuit in *Action for Children’s Television* does not provide a definition for “valuable privilege,” but does cite to, and seems to

unfair advantage [by the ex parte communications] outweighs the practical burdens” of placing those communications in the rulemaking docket.⁴⁸ The United States Department of Transportation provides a thorough explanation of a rulemaking docket:

The rulemaking docket is the file in which [an agency] places all of the rulemaking documents it issues (e.g., the NPRM, hearing notices, extensions of comment periods, and final rules), supporting documents that it prepares (e.g., economic and environmental analyses), studies that it relies on that are not readily available to the public, all public comments related to the rulemaking (e.g., comments that may be received in anticipation of the rulemaking, comments received during the comment period, and late-filed comments), and other related documents [Most] agencies use the electronic, internet-accessible dockets at Regulations.gov as their complete, official-record, docket; all hard copies of materials that should be in the docket, including public comments, are electronically scanned and placed in the docket.⁴⁹

The D.C. Circuit affirmed the *Action for Children’s Television* court’s “valuable privilege” ex parte communications rule in *Sierra Club v. Costle*.⁵⁰ In *Costle*, the EPA initiated procedures to issue a rule requiring coal steam generators to lower their sulfur dioxide emissions. After the comment period had ended, the agency engaged in a number of ex parte meetings, and received a number of ex parte documents regarding the introduction of a new, higher emission standard.⁵¹ The court held that “[a] judicially imposed blanket requirement that all post-comment period oral communications be docketed . . . is unnecessary for achieving the goal of an established, procedure-defined docket”⁵² The court believed that mandating placement of all ex parte communications in the docket contravened the intent of Congress, because the legislative history of the Sunshine Act indicated that Congress contemplated prohibiting—but ultimately decided to allow—ex parte communications in informal

rely on, a special concurrence from *Home Box Office, Inc.* In the special concurrence, Judge MacKinnon suggests that a “valuable privilege” involves “competitive interests of great monetary value” *Home Box Office*, 567 F.2d 9, 62 (D.C. Cir. 1977) (MacKinnon, J., concurring specially).

48. *Action for Children’s Television v. FCC*, 564 F.2d 458, 477 (D.C. Cir. 1977).

49. *Regulations*, U.S. DEP’T TRANSP., <http://regs.dot.gov/regulations/> (last visited Apr. 16, 2013).

50. 657 F.2d 298, 396–98 (D.C. Cir. 1981).

51. *Id.*

52. *Id.* at 403.

rulemaking.⁵³ After *Costle*, and as the law currently stands, only ex parte communications that are material to a valuable privilege must be placed in the rulemaking docket, and the agency has full discretion to determine whether it wants to include more ex parte communication summaries in its rule making docket.⁵⁴

The United States Supreme Court's ruling in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*⁵⁵ three years after *Costle*, held that courts may not impose procedures on an agency that are not specified in the statute authorizing the agency action.⁵⁶ The validity of any judicially-created requirement to docket ex parte communications is still in question.⁵⁷ Because most agency-creating statutes do not require docketing of ex parte communications, *Vermont Yankee* suggests that the D.C. Circuit may not be able to require agencies to docket ex parte communications, even those material to a valuable right or privilege. Though the effect of *Vermont Yankee* on prior ex parte communication jurisprudence moves well beyond the scope of this paper, it is important to note that a docketing requirement of ex parte communications during informal rulemaking, if challenged, would not likely be upheld by the Supreme Court.⁵⁸

III. Case Study: The Obama Administration, the EPA, and Ex Parte Communications

The Clean Air Act ("CAA") gives the EPA the authority to promulgate and revise rules regulating air pollutants in the United States.⁵⁹ Two sections specifically govern the EPA's "establishment and revision of the national ambient air quality standards" ("NAAQS") under the CAA.⁶⁰ Section 108 requires the administrator of the EPA

53. See *id.* at 401-02; 121 CONG. REC. 35330 (daily ed. Nov. 6, 1975) ("Informal rulemaking proceedings are also susceptible to ex parte influence. These areas are, however, left untouched by the provisions of [the Sunshine Act.]").

54. *Sierra*, 657 F.2d at 402-03.

55. 435 U.S. 519 (1978).

56. *Id.* at 525.

57. *Id.* at 524. ("[G]enerally speaking [the rule making] section of the [APA] established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures. Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them.")

58. The U.S. Supreme Court reaffirmed the *Vermont Yankee* decision in *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633 (1990).

59. See generally 42 U.S.C. §§ 7401-7626 (1970).

60. Env'tl. Prot. Agency, National Ambient Air Quality Standards for Ozone Preamble, at 1 (2011) [hereinafter NAAQS Preamble], available at http://www.epa.gov/air/ozon-pollution/pdfs/201107_OMBdraft-OzoneNAAQSpreamble.pdf.

“to identify and list certain air pollutants and then to issue air quality criteria to those pollutants.”⁶¹ Section 109 directs the administrator of the EPA to “propose and promulgate ‘primary’ and ‘secondary’ NAAQS for pollutants under which air quality criteria are issued.”⁶² Every five years since December 31, 1980, the CAA has directed the EPA to review the criteria published under section 108, to make revisions, and to promulgate new rules as necessary.⁶³ “The CAA does not require the Administrator [of the EPA] to establish a primary NAAQS at a zero-risk level or at background concentration levels . . . but rather at a level that reduces risk sufficiently so as to protect public health with an adequate margin of safety.”⁶⁴ Though the EPA can use a variety of factors in determining what standards are sufficiently within an adequate margin of safety, it ultimately remains “a policy choice left specifically to the Administrator’s judgment.”⁶⁵

On January 6, 2010, the EPA published a notice of proposed rulemaking titled: “Reconsideration of the 2008 National Ambient Air Quality Standards for Ozone.”⁶⁶ The EPA, after reconsidering “the primary and secondary national ambient air quality standards . . . for ozone (O₃) set in March 2008, [] has determined that different standards than those set in 2008 are necessary to provide requisite protection of public health and welfare, respectively.”⁶⁷ The EPA held three public hearings regarding the proposed rule in Arlington, Virginia and Houston, Texas on February 2, 2010 and in Sacramento, California on February 4, 2010.⁶⁸ Given the controversial nature of environmental regulations such as these,⁶⁹ over 6,000 comments were

61. *Id.* at 7.

62. *Id.*

63. *Id.* at 9.

64. *Id.* at 8–9.

65. *Id.*; *see also* Lead Industries Association v. EPA, 647 F.2d 1130, 1161–62 (D.C. Cir. 1980).

66. National Ambient Air Quality Standards for Ozone, 75 Fed. Reg. 2938 (Jan. 19, 2010) (to be codified at 40 C.F.R. §§ 50, 58).

67. *See* NAAQS Preamble, *supra* note 60, at 1.

68. National Ambient Air Quality Standards for Ozone, 75 Fed. Reg. 2938 (Jan. 19, 2010) (to be codified at 40 C.F.R. §§ 50, 58).

69. Because all jurisdictions have to comply with the new standards once issued as a final rule by the EPA, a major concern is that many states will fall out of compliance, making this a highly contentious proposed rule. For example, a comment from the Ohio EPA stated:

It is with a dedication to making necessary improvements to Ohio’s air, and with a sense of the stark realities that would result from the imposition of such a significantly reduced standard, that Ohio EPA . . . does not believe that the ozone standard should be further lowered to a level below the 2008 standard of 0.075 ppm at this time.

submitted to *Regulations.gov*⁷⁰ during the comment period for the proposed rule from January 6, 2010 to March 22, 2010.⁷¹ The groups who engaged in ex parte communications with the EPA—such as industry groups or representatives and individual businesses⁷²—all submitted comments to *Regulations.gov* during the comment period.⁷³ However, the docket available on *Regulations.gov* does not provide any such comment from the executive.⁷⁴ Months after the comment period ended, the executive hosted a number of meetings with industry representatives, interest groups, and EPA staff.⁷⁵ The only publicly available documents from these meetings are those provided by the industry or interest group representatives.⁷⁶ On July 11, 2011, the EPA submitted a draft final rule to OIRA, and on September 2, 2011, OIRA (under instructions from the President), requested that the EPA delay issuing the final rule.⁷⁷

While the comments in the docket seem to indicate that the executive had little say on the proposed rule, the executive actually had a number of ex parte meetings and communications with the EPA regarding this proposed rule after the designated comment period had ended.⁷⁸ While some OMB staff communications and documents from meetings with EPA staff are posted to *Regulations.gov*, these documents were almost always created post-comment period, and the content is so bare and obscure that only the OMB and EPA staffers could

Chris Korleski, *Comment from Public Hearing on Review of the National Ambient Air Quality Standards for Ozone*, REGULATIONS.GOV (Apr. 16, 2010), <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2005-0172-12909>.

70. All numbers for comment and documents received throughout the rulemaking process are based on the materials available on Regulations.gov in the docket for Docket ID: EPA-EPA-HQ-OAR-2005-0172. These numbers do not represent all documents within the docket however, because the EPA is not legally allowed to post some documents to the public docket (for example, copyrighted material, or comments submitted by minors under the age of 13).

71. National Ambient Air Quality Standards for Ozone, 75 Fed. Reg. at 2938.

72. For example, businesses that engaged in ex parte communications include the National Association of Home Builders, Utility Air Regulatory Group, NAM, Alliance of Automobile Manufacturers, American Petroleum Institute, Exxon Mobile and the Dow Chemical Company, and interest groups like the Sierra Club and American Lung Association.

73. See generally *Review of Air Quality Standards*, *supra* note 22.

74. NAAQS Preamble, *supra* note 60, at 138.

75. See *infra* notes 81–87 and accompanying text.

76. See *infra* Part IV.B.

77. Letter from Cass Sunstein, *supra* note 1.

78. See National Ambient Air Quality Standards for Ozone, 75 Fed. Reg. 2938 (Jan. 19, 2010) (to be codified at 40 C.F.R. §§ 50, 58); *Office of Management and Budget Meeting Records*, WHITE HOUSE, http://www.whitehouse.gov/omb/oira_2060_meetings (last visited Apr. 16, 2013).

fully understand what the communications refer to.⁷⁹ Documents from the important rule-altering meetings between the executive and EPA are notably absent from the *Regulations.gov* docket. Instead, the docket provides one document that directs the reader to the OMB website.⁸⁰ The media reported that EPA Administrator Lisa Jackson had at least three meetings with White House Chief of Staff William M. Daley during June 2010 to discuss White House political concerns about the issuance of a final rule.⁸¹ Mr. Daley also attended eight meetings with industry and interest group representatives during July and August 2011.⁸² These meetings seemingly have extra significance because the Chief of Staff rarely participates in these meetings, as confirmed by former OIRA administrators.⁸³ OMB held seven meetings during July and August 2011 to review and discuss the EPA's proposed rule with various members of the EPA staff.⁸⁴ In one of those meetings, on August 16, 2011 (two weeks before the executive requested the EPA delay issuing the final rule), Chief of Staff Daley met with industry leaders to allow them to air their grievances with the rule.⁸⁵ This August 16 meeting included: Jack Gerard, president of the American Petroleum Institute; Cal Dooley, American Chemistry Council; Jay Timmons, National Association of Manufacturers; John Engler, chairman of the Business Roundtable; and Bruce Josten, chief lobbyist for the U.S. Chamber of Commerce.⁸⁶ Another OMB meeting was

79. See, e.g., *Attendance List for Oct. 13, 2010 Meeting with Gary Guzy and Nancy Sutley at OMB re: Ozone*, REGULATIONS.GOV (Nov 29, 2010), <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2005-0172-12965>.

80. *Memorandum to the Docket Regarding Reconsideration of the Ozone Standard Convened by the Office of Management and Budget and Attended by the Environmental Protection Agency*, REGULATIONS.GOV (Aug. 30, 2011), available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2005-0172-13080>.

81. David Dayen, *Review of White House Ozone Decision Shows Clout of Bill Daley*, FDL NEWS DESK (Nov. 17, 2011), <http://news.firedoglake.com/2011/11/17/review-of-white-house-ozone-decision-shows-clout-of-bill-daley/>.

82. *Memorandum to the Docket regarding Reconsideration of the Ozone Standard Convened by the Office of Management and Budget and Attended by the Environmental Protection Agency*, REGULATIONS.GOV (Aug. 30, 2011), <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2005-0172-13080>; see also *Office of Management and Budget Meeting Record*, WHITE HOUSE, http://www.whitehouse.gov/omb/oira_2060_meetings (last visited Apr. 16, 2013).

83. Kevin Bogardus & Ben Gemen, *White House May Take Bigger Role in Vetting Regulations*, THE HILL, Sept. 7, 2011, at 2.

84. *Id.*

85. *Id.*; see also John M. Broder, *Obama Administration Abandons Stricter Air-Quality Rules*, N.Y. TIMES (Sept. 2, 2011), <http://www.nytimes.com/2011/09/03/science/earth/03air.html?pagewanted=all&r=0>.

86. *Id.*; see also *Meeting Record, Reconsideration of the 2008 Ozone Primary and Secondary National Ambient Air Quality Standards Rule*, WHITE HOUSE (Aug. 16, 2011), http://www.whitehouse.gov/omb/2060_meeting_08162011 [hereinafter *Meeting Record*].

held on the same day, and included interest group representatives: Debbie Sease, legislative director of the Sierra Club; Charles Connor, president and CEO of the American Lung Association; Daniel Lashof, program director of the National Resources Defense Council; and Nancy Tate, executive director of the League of Women Voters.⁸⁷ Documents from these ex parte meetings with the executive are still not directly available in the docket,⁸⁸ and yet within weeks after these meetings, the executive decided to halt the EPA's issuance of a final rule on reduced ozone standards.⁸⁹ Clearly these meetings were vital to the decision, yet the general public has no ability to review the substance of the discussion that occurred in such meetings. Why would the executive want to raise the specter of undue influence based on these meetings? In the alternative, if the executive determined that important issues still needed to be considered before issuing a final rule, why not disclose those issues so the delay of the final rule could be fully understood by the public?

IV. Executive and Private Industry Contacts on Agency Rulemaking: Does it Really Make a Difference?

Unsurprisingly, political pressure from all directions influences agency rulemaking. However, by the design of informal rulemaking, not all these communications with an agency can or should be regulated. In the EPA rule discussed above, the major ex parte contacts with the agency included private industry, interest groups, and the executive. This section discusses how private industry, interest groups, and the executive communicate with the agency, and why the executive should be more tightly restricted when engaging in ex parte communications.

A. Private Industry and Interest Group Ex Parte Communications

Private industry and interest groups have an intrinsic interest in the EPA's ozone reconsideration rule. Private industry is primarily concerned with the economic impact this regulation would have on

87. See Broder, *supra* note 85; *Meeting Record, Reconsideration of the 2008 Ozone Primary and Secondary National Ambient Air Quality Standards Rule*, WHITE HOUSE (Aug. 16, 2011), http://www.whitehouse.gov/omb/2060_meeting_08162011.

88. See *Review of Air Quality Standards*, *supra* note 22.

89. Gina McCarthy, *E-mail to Office of Management and Budget Staff*. SUBJECT: Revised Ozone (O3) Notice of Proposed Rulemaking (NPR), REGULATIONS.GOV (Dec. 30, 2009), <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2005-0172-7243>.

their business interests.⁹⁰ Environmental interest groups often organize for the purpose of influencing environmental policy in the United States, typically for more stringent, earth-friendly standards.⁹¹ Other interest groups, though not solely environmentally focused, may prioritize the environment as one of their issues. Although the public might be wary of the EPA's communications with groups that have such a vested interest in the outcome of the regulation, private industry and interest groups readily disclose their primary objectives when communicating with the EPA. For example, the chair of the Houston Group Sierra Club submitted a written comment that stated while "[o]thers will talk about the benefits of the new proposed ozone standards regarding health and clean air . . . [his] concern is the effects of industrial greenhouse gases on the atmosphere and the devastating effect on the global climate."⁹² A policy advisor for the American Petroleum Institute wrote, "[m]any local communities will be saddled with new costs that will hurt both large and small businesses and prevent expansion and growth. Fuels that cost more to manufacture would be required in more areas. Jobs will unnecessarily be lost."⁹³ The director for energy and resources policy for the National Association of Manufacturers ("NAM") made it clear that "the NAM opposes regulations that would impose more compliance costs on the manufacturing sector . . . [and] urge[d] [the] EPA to withdraw the propo-

90. For example, the Business Roundtable's Energy and Environment Committee, when referring to its policy strategy for the environment, writes on its website, "[m]eeting the sustainable growth challenge will not be easy or cost-free, but we can *significantly mitigate the costs* associated with this transformation of our economy through sound policy choices that accelerate the deployment of key technologies." *Energy and Environment Committee: Environment*, BUS. ROUNDTABLE, <http://businessroundtable.org/committees/sustainable-growth/environment/> (last visited Apr. 16, 2013) (emphasis added). Also, the American Petroleum Industry (API) writes that the industry mission regarding the environment, health and safety is "to influence public policy *in support of a strong, viable U.S. oil and natural gas industry* essential to meet the energy needs of consumers in an efficient, environmentally responsible manner." *Industry Mission*, AM. PETROLEUM INST., <http://www.api.org/globalitems/globalheaderpages/about-api/industry-mission.aspx> (last visited Apr. 16, 2013) (emphasis added).

91. See generally SIERRA CLUB, <http://www.sierraclub.org/welcome/> (last visited Apr. 16, 2013).

92. Ron Hayden, *Comment from Public Hearing on Review of the National Ambient Air Quality Standards for Ozone*, REGULATIONS.GOV (Feb. 24, 2010), <http://www.regulations.gov/#documentDetail;D=EPA-HQ-OAR-2005-0172-10231>.

93. Steichen, *supra* note 32, at 3.

sal.”⁹⁴ Finally, the director of air quality for the National Mining Association (“NMA”) wrote that

[a]ny revision to the ozone NAAQS will have direct and indirect impacts on the mining community, including NMA member operations that may fall within potential EPA-designated nonattainment areas Significant adverse consequences exist for areas determined to be in nonattainment . . . [and] [c]ompliance with a new NAAQS will also result in tremendous cost to industry.⁹⁵

Despite numerous *ex parte* meetings and communications between the executive and the EPA, the public can confidently assume that private industry reiterated “that the rule would be very costly to industry and would hurt Mr. Obama’s chances for a second term.”⁹⁶ These sentiments are similar to those relayed in the comments submitted for public discourse on *Regulations.gov* during the comment period for this proposed rule.⁹⁷ Similarly, documents from *ex parte* meetings with interest groups available in the docket parallel the health benefit arguments for stricter ozone standards clearly articulated in the comments submitted by the same interest groups during the comment period.⁹⁸

B. Executive Ex Parte Communications

Executive influence can present itself in many forms. While the President himself may be involved in the discussion for those rare, well-publicized and controversial rules, executive influence more com-

94. Bryan L. Brendle, *Comment from Public Hearing on Review of the National Ambient Air Quality Standards for Ozone*, REGULATIONS.GOV (Mar. 24, 2010), <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2005-0172-12439>.

95. Ben Brandes, *Comment from Public Hearing on Review of the National Ambient Air Quality Standards for Ozone*, REGULATIONS.GOV (Mar. 23, 2010), <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2005-0172-12227>.

96. John M. Broder, *Obama Administration Abandons Stricter Air-Quality Rules*, N.Y. TIMES, Sept. 2, 2011, at A1 (paraphrasing what the members of the Business Roundtable told White House Chief of Staff William M. Daley).

97. See, e.g., Steichen, *supra* note 32.

98. See *Meeting of USEPA Administrator Lisa Jackson with the American Lung Association and Public Health/Medical Organizations to Discuss the Ozone Primary NAAQS 5/20/2010*, REGULATIONS.GOV (Nov. 23, 2010), <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2005-0172-12961>; American Lung Association, et al., *Comment from Public Hearing on Review of the National Ambient Air Quality Standards for Ozone*, REGULATIONS.GOV (Mar. 24, 2010), <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2005-0172-12445> (“The American Lung Association, Earthjustice, Environmental Defense Fund, Natural Resources Defense Council, and Sierra Club submit these comments in support of science driven primary National Ambient Air Quality Standards for ozone in order to *protect public health* with an adequate margin of safety as required by the Clean Air Act.” (emphasis added)).

monly takes the form of OIRA in the OMB.⁹⁹ The OMB began its move towards becoming the powerful “program for oversight of regulation” that it is today during the Reagan administration.¹⁰⁰ Beyond the procedural requirements imposed on agencies by the Reagan administration,¹⁰¹ the OMB wields enormous informal power over administrative agencies. This power includes: the power of persuasion, threats to delay review of the notice to promulgate,¹⁰² reminding senior political appointees to the agency of their allegiance to the administration, decreasing the agency’s budget and legislative power, and—most importantly—its ability to request that the President remove the head of an uncooperative agency.¹⁰³ OIRA, tasked with the supervision of agency rulemaking, conducts the ground-level review of proposed regulations.¹⁰⁴ OIRA’s review of proposed regulations has been compared to the “‘hard look’ review of the courts, that asks whether regulations are persuasively reasoned and consistent with the agency’s other policies and its [enabling] statute.”¹⁰⁵

OIRA and the OMB were extremely influential in the final outcome of the EPA’s reconsideration of ozone standards. The OMB submitted edits to the proposed rule to the EPA¹⁰⁶ the day before the EPA announced that it would be reconsidering the 2008 NAAQS standards, and over a week before the EPA published its Notice of Proposed Rulemaking (“Notice”) in the Federal Register.¹⁰⁷ Before the EPA opens the docket for public comment, the OMB has the ability to substantively alter the EPA’s work. In a summary memorandum in the docket available on *Regulations.gov*, the content of OIRA’s edits to the Notice are listed, and for each edit the document notes that OMB’s

99. See Bruff, *supra* note 25, at 557–59.

100. *Id.* at 549.

101. Exec. Order No. 12291, 46 Fed. Reg. 13,193 (Feb. 17, 1981) (for example, the executive order signed by Reagan requires an agency to justify every rule it promulgates by preparing a lengthy Regulatory Impact Analysis).

102. OIRA, within the OMB, conducts a review of every Notice, as a part of the Paperwork Reduction Act of 1980, which requires OIRA to “review all collections of information by the Federal Government.” *About OIRA*, WHITE HOUSE, http://www.whitehouse.gov/omb/inforeg_administrator (last visited Apr. 16, 2013).

103. Bruff, *supra* note 25, at 561.

104. *About OIRA*, WHITE HOUSE, http://www.whitehouse.gov/omb/inforeg_administrator (last visited Apr. 16, 2013).

105. Bruff, *supra* note 25, at 557.

106. Despite the fact that these edits were incorporated into the Notice, the edits were not posted to *Regulations.gov* until April 7, 2010.

107. *Notice of Proposed Rulemaking with Office of Management and Budget (OMB) Edits*, REGULATIONS.GOV (Apr. 6, 2010), <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2005-0172-12813>.

“changes were included in a [subsequent] version of the draft Ozone NPR sent to OMB.”¹⁰⁸ The EPA apparently took the OMB’s suggestions seriously, ensuring that they made “edits to address OMB’s issues” before the final Notice was published in the Federal Register.¹⁰⁹ OIRA then conducted a review of the Reconsideration of the 2008 Ozone NAAQS (as required under Executive Order 12866),¹¹⁰ which, like OIRA’s edits to the Notice, concluded before the public comment period even commenced.¹¹¹ OIRA review generally “asks whether regulations are persuasively reasoned and consistent with the agency’s other policies and its statute. Thus, the executive can both pursue optimal policy and search out analytical errors that would otherwise cause problems in court.”¹¹² In order to achieve these objectives, “[a] certain amount of tinkering with rules probably results from the efforts of [OIRA] desk officers.”¹¹³

After the Notice was published in the Federal Register, the executive branch became noticeably absent from the docket on *Regulations.gov*. However, the media reported multiple meetings between OMB, the White House Chief of Staff, EPA staff, and private industry.¹¹⁴ The White House provides some evidence of these meetings in a section on the OMB webpage that lists “OIRA Communications with Outside Parties.”¹¹⁵ The OMB provides “Meeting Records” for eight

108. *Memorandum to Docket for Reconsideration of 2008 Ozone NAAQS (Docket ID No. EPA-HQ-OAR-2005-0172)*. SUBJECT: *Meetings with OMB on draft Ozone Reconsideration Notice of Proposed Rulemaking*, (Jan. 18, 2010) REGULATIONS.GOV, <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2005-0172-7251>.

109. Gina McCarthy, *Email to Office of Management and Budget Staff*. SUBJECT: *Revised Ozone (O3) Notice of Proposed Rulemaking (NPR)*, REGULATIONS.GOV, (Jan. 18, 2010), <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2005-0172-7243>.

110. *Economic Analysis of Federal Regulations Under Executive Order 12866*, WHITE HOUSE (Jan. 11, 1996), http://www.whitehouse.gov/omb/inforeg_rguide/

After President Clinton signed Executive Order 12866, ‘Regulatory Planning and Review,’ the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget convened an interagency group to review the state of the art for economic analyses of regulatory actions required by the Executive Order.

Id.

111. Heidi King, *Email to OMB/USEPA Staff*. Subject: *OIRA has Concluded EO 12866 Review of Reconsideration of the 2008 Ozone NAAQS*, REGULATIONS.GOV (Jan. 18, 2010), <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2005-0172-7249>.

112. Bruff, *supra* note 25, at 557–58.

113. *Id.* at 558.

114. See Dayen, *supra* note 81; Bogardus, *supra* note 83; Broder, *supra* note 85. Interest group meetings were held, but the media had little to nothing to comment on from those meetings.

115. *OIRA Communications with Outside Parties*, WHITE HOUSE, http://www.whitehouse.gov/omb/oira_default (last visited Apr. 16, 2013).

meetings between July 25, 2011 and August 16, 2011.¹¹⁶ These meetings are not only significant because they are *ex parte* with industry and interest groups, but because they were all conducted *after* the EPA had made a policy determination to move forward and issue a Final Rule for the Reconsideration of the 2008 Ozone NAAQS.¹¹⁷ Each of the “records include a list of any attendees and any handouts.”¹¹⁸ The quantity and quality of the documents provided by the industry and interest groups provide the public with only a glimpse into these meetings. The quantity is important because more documents allow the public to discern the substantive issues discussed at the meeting. Quality is important because the public can look more specifically at the arguments by industry and interest groups to the OMB and EPA. On July 25, July 27, July 29, August 2, and August 16 of 2011, the OMB held meetings with interest groups that supported the Reconsideration of the 2008 Ozone NAAQS Standards.¹¹⁹ In the course of these five meetings, eighteen documents were attached to the report, with almost 270 pages of material supporting the interest groups’ position.¹²⁰ Of the three meetings with private industry that did not support the Reconsideration of the 2008 Ozone NAAQS, only one six page document was attached to the report for the August 16, 2011 meeting.¹²¹ This sole document displays a PowerPoint presentation showing the number of current nonattainment counties,¹²² and the additional counties that would be added to that list if the reconsidera-

116. *Meeting Records*, WHITE HOUSE, http://www.whitehouse.gov/omb/oira_2060_meetings (last visited Apr. 16, 2013).

117. NAAQS Preamble, *supra* note 60, at 5.

118. *Memorandum to the Docket regarding Reconsideration of the Ozone Standard Convened by the Office of Management and Budget and Attended by the Environmental Protection Agency*, REGULATIONS.GOV (Dec. 6, 2011), <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2005-0172-13080>.

119. *OIRA Communications with Outside Parties*, WHITE HOUSE, http://www.whitehouse.gov/omb/oira_default (last visited Apr. 16, 2013).

120. *Meeting Record, NAAQS for Ozone*, WHITE HOUSE (July 25, 2011), http://www.whitehouse.gov/omb/2060_meeting_07252011 (“Dear Mr. President . . . [o]ver a year has passed since this announcement [to reconsider the 2008 NAAQS for ozone] and we write today to ask that you direct the EPA to issue a strong standard to protect public health.”).

121. *Meeting Record, Reconsideration of the 2008 Ozone Primary and Secondary National Ambient Air Quality Standards Rule*, WHITE HOUSE (Aug. 16, 2011), http://www.whitehouse.gov/omb/2060_meeting_08162011.

122. “Areas of the country where air pollution levels persistently exceed the national ambient air quality standards may be designated ‘nonattainment.’” *The Green Book Nonattainment Areas for Criteria Pollutants*, U.S. ENVTL. PROT. AGENCY (Dec. 14, 2012), <http://www.epa.gov/airquality/greenbook>.

tion rule were finalized.¹²³ While this document (and the documents provided during the interest group meetings) provides a glimpse into the substance of these meetings, the public cannot understand what the executive considered pertinent within these meetings. Although this may be acceptable for policy discussions in the abstract, the lack of transparency is completely unacceptable given that these meetings ultimately persuaded the executive to reverse a policy decision that statutorily lies within the sole discretion of the administrator of the EPA.

Clearly, private industry's argument that the OMB should stop the promulgation of the Reconsideration of the 2008 Ozone NAAQS rule won the day over the EPA's decision to issue the final rule. However, all meetings between OMB, private industry representatives, and interest groups—especially the obviously persuasive meetings with industry representatives—remain shielded from the public eye with less than twenty documents and a list of attendees to prove that they even occurred.¹²⁴ Private industry representatives and interest groups should not be faulted for expressing their opinions and concerns, and should likewise not be blamed for the public being unaware of the *ex parte* meetings. Private industry and interest groups placed their concerns into the public discourse by submitting over 1,400 comments to *Regulations.gov* during the comment period.¹²⁵ It should be the responsibility of the executive to maintain transparency because it was the executive who ultimately, after discussing the issue with both private industry and interest groups, determined that the rule would not be finalized and promulgated.¹²⁶ Given that the EPA had decided to move forward with drafting its final rule, as is within its discretion, the executive should be required to provide ample explanation for terminating that agency action. Merely posting documents supplied by the meeting's attendees to the OMB website and providing a list of attendees is grossly insufficient to satisfy such a requirement.

Is it a problem that the executive wields so much influence over agencies, overriding policy decisions that are legislatively within the agency's discretion? Though such a complex issue goes beyond the scope of this paper, a brief discussion may be helpful. An argument

123. *Meeting Record, Reconsideration of the 2008 Ozone Primary and Secondary National Ambient Air Quality Standards Rule*, WHITE HOUSE (Aug. 16, 2011), http://www.whitehouse.gov/omb/2060_meeting_08162011.

124. *Id.*

125. *Review of Air Quality Standards*, *supra* note 22.

126. *See* Sunstein Letter, *supra* note 1.

can be made that because the entire country elects the President, agencies should follow the President's policy since it reflects the will of the people. The term itself, "executive agency,"¹²⁷ lends further support to this argument. While persuasive, this ignores the importance of the separation of powers. Congress wrote the statutes that created agencies, and mandated the agencies perform some variety of tasks under a legislative standard. Congress intended that these agencies become experts in their given field, and could therefore be trusted with that discretion to issue regulations.¹²⁸ If Congress intended the executive to have a veto power over agency actions, it would have written as much in the statute. Since Congress has not granted the executive such power, the executive should not be able to wield it.

However, such an academic argument ignores the reality that nearly two decades have passed with strong OMB involvement in agency rulemaking. To pretend that the world of strict separation of Congress, agency, and executive power could exist in actuality is simply a dream. Instead of theorizing that the executive would actually allow an agency to use its own discretion without interference, the executive should be required to disclose substantive summaries of its meetings with private industry, interest groups, and the agency, to explain why the executive reached its decision. This type of disclosure would increase public confidence in the process, even if no substantive changes occur as to how the executive wields power over those agencies.

V. Potential Solutions to the Problem of Executive Influence

Ex parte influence in informal agency rulemaking does affect the outcome of a given regulation, as illustrated by the case study above. The "APA offers no direct guidance for the treatment of ex parte contacts[, and t]his statutory gap has proven problematic in recent years where off-the-record communications—often containing critical data or policy arguments from regulated industry—have threatened to distort decision making within administrative agencies."¹²⁹ While industry and interest groups are entitled to have opinions that promote their objectives, the executive cannot allow those opinions to "distort

127. *The Executive Branch*, WHITE HOUSE, <http://www.whitehouse.gov/our-government/executive-branch> (last visited Apr. 16, 2013) (executive agencies are those which the President can appoint and remove an Administrator).

128. See generally Nagareda, *supra* note 2, at 593.

129. *Id.* at 592.

decision making within administrative agencies” without providing an explanation to the public.¹³⁰ “An appropriate solution to the ex parte contacts problem must reconcile rule of law values with competing concerns for agency expertise and political responsiveness.”¹³¹ By requiring the executive to disclose the substantive discussions of ex parte meetings and to explain why the executive reached its decision, the decision-making process will be transparent, while remaining politically responsive to competing interests. This would allow the public to determine why the executive—which receives the same information as the EPA (since the EPA also sits in on the OMB’s ex parte meetings)—came to a dramatically different decision regarding the issuance of a final rule than the agency responsible for making such a decision. Because imposing such a requirement on the executive will likely never come to fruition,¹³² it is important to analyze the effectiveness and likelihood of other possible ways to limit executive ex parte communications that influence agency rulemaking.

A. Judicial Limits Imposed on Ex Parte Communications

Regulations can be challenged in court if there is suspicion that ex parte communications affected the fate of that regulation.¹³³ Courts typically review agency action (e.g. rulemaking) under an arbitrary and capricious standard of review.¹³⁴ An agency action is arbitrary and capricious if, after considering the relevant factors, a court finds that there has been a clear error of judgment by the agency.¹³⁵ Subsequent courts have noted in dicta that there is a clear error of judgment if, among other possibilities, the agency relied on factors that Congress did not intend it to consider, or if the agency offered an explanation for its decision that runs counter to the evidence before the agency.¹³⁶ Ex parte communications could make issuing (or in

130. *Id.*

131. *Id.* at 595–96.

132. Just as it is unlikely that the executive will halt all influence over agency rulemaking, a requirement that the executive document the substance of all ex parte meetings is probably unrealistic. However, as this paper illustrates, executive influence over agency rule making is a real problem, and therefore there need to be discussions for real solutions. This paper is meant to shed light on the problem and one possible solution, no matter how unlikely implementation of such a solution would be.

133. See e.g., *Sangamom Valley Television Corp v. United States*, 269 F.2d 221 (D.C. Cir. 1959); *Home Box Office v. FCC*, 567 F.2d 9 (D.C. Cir. 1977).

134. 5 U.S.C. § 706(2)(A) (2006).

135. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

136. *Motor Vehicle Mfrs. Ass’n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

this case failing to issue) a rule arbitrary and capricious under either of these standards, but the challenging party may have difficulty persuading the court using this argument.

First, it is questionable whether Congress did in fact intend for agencies to not consider *ex parte* communications when conducting informal rulemaking. As noted above, the legislative history of the Sunshine Act indicates that Congress considered prohibiting *ex parte* communications in informal rulemaking, but ultimately decided to allow such communications.¹³⁷ Agency action may also be arbitrary and capricious if the agency decision runs counter to the evidence before the agency. However, *ex parte* communications do not always necessarily run contrary to the other evidence before the agency. In the case study, approximately 100 comments and documents entered into the docket during the comment period¹³⁸ urged the EPA to avoid or delay issuing a final rule.¹³⁹ In fact, some of these comments and documents submitted reflected the idea that the EPA was statutorily required to review the NAAQS standards for ozone in 2013 in any case, and it was also one of the three reasons cited by the executive when it requested that the EPA delay issuing a final rule.¹⁴⁰ However, the comments and documents during the comment period supporting issuance of the final rule outnumbered those comments and documents approximately sixty-eight to one.¹⁴¹ The EPA's decision to issue the final rule in this case, therefore, did not run counter to the evidence before the agency. The executive's reversal of that decision, however,

137. See 5 U.S.C. § 557(d)(1).

138. There were also approximately 260 comments and documents entered into the docket after the comment period that urged the EPA to avoid or delay the issuing of the final rule. See *Review of Air Quality Standards*, *supra* note 22.

139. *Id.*

140. Compare Nancy N. Young, *Comment from Public Hearing on Review of the National Ambient Air Quality Standards for Ozone*, REGULATIONS.GOV (Mar. 25, 2010), <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2005-0172-12641> ("EPA announced in September 2009 that it would revisit the NAAQS [for ozone], notwithstanding that the statutory period of 5 years from the 2008 decision for undertaking such a review had not transpired."), and Kimberly S. Lagomarsino, *Comment from Public Hearing on Review of the National Ambient Air Quality Standards for Ozone*, REGULATIONS.GOV (Mar. 16, 2010), <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2005-0172-11345> ("As the Clean Air Act requires EPA to review the National Ambient Air Quality Standards (NAAQS) and their scientific basis every five years to determine whether revisions are appropriate, proposing to revise a standard put forth only two years prior . . . is premature."), with Sunstein Letter, *supra* note 1 ("The current cycle began in 2008, and EPA will be compelled to revisit the most recent standards again in 2013. . . . In this light, issuing a final rule in late 2011 would be problematic in view of the fact that a new assessment, and potentially new standards, will be developed in the relatively near future.").

141. See *Review of Air Quality Standards*, *supra* note 22.

might run counter to the evidence before the agency. As the case study illustrates, in a world where OMB dominates agency rulemaking, executive ex parte communications with the agency must be considered when determining whether the action was arbitrary and capricious. Judicial review under the arbitrary and capricious standard may not provide enough restriction on executive ex parte communications because the rule will have to undergo the rulemaking procedure again.

Courts could also impose a ban on ex parte communications in informal rulemaking similar to the doctrinal structure the D.C. Circuit attempted to create in *Home Box Office*.¹⁴² Such a categorical rule, however, is unlikely to survive the Supreme Court's decision in *Vermont Yankee*,¹⁴³ and would require specific statutory guidance on ex parte communications in the agency's enabling act for the court to find such a limitation legal. The D.C. Circuit contemplated the issue of executive ex parte communications in *Sierra Club v. Costle*.¹⁴⁴ There was evidence of one undocumented meeting between "the President, White House staff, other high ranking members of the Executive branch, as well as EPA officials, and which concerned the issues and options presented by the rulemaking."¹⁴⁵ The court determined that because Congress does not expressly forbid them, the ex parte meetings between the executive and the EPA were legal.¹⁴⁶ Although the court discussed the benefits of docketing these communications, it ultimately found that the failure to docket was not unlawful, and did not invalidate the final rule issued by the EPA.¹⁴⁷ The D.C. Circuit also noted that, "[w]here the President himself is directly involved in oral communications with Executive Branch officials, Article II considerations—combined with the strictures of *Vermont Yankee* require that courts tread with extraordinary caution in mandating disclosure beyond that already required by statute."¹⁴⁸

142. *Home Box Office*, 567 F.2d at 17; see also *supra* Part II.

143. *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 524 (1978).

144. *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981).

145. *Id.* at 404.

146. *Id.* at 404–05.

147. *Id.* at 406–07 ("We recognize . . . that there may be instances where the docketing of conversations between the President or his staff and other Executive Branch officers or rulemakers may be necessary to ensure due process. . . . Docketing may also be necessary in some circumstances where a statute . . . specifically requires that essential 'information or data' upon which a rule is based be docketed." (emphasis added)).

148. *Id.* at 407.

Courts could try to circumvent *Vermont Yankee* by finding that whenever undocumented *ex parte* communications between the agency and executive occur that change the fate of a rule, the agency based its action on an inadequate administrative record and subsequently “remand to the agency . . . to select suitable procedural devices for generation of an adequate record in light of [the agency’s] familiarity with the regulatory context.”¹⁴⁹ The procedural devices used by agencies to generate an adequate record could include ceasing all *ex parte* communications with the executive, or more realistically, providing summaries of these meetings in the docket.

Courts, like the D.C. Circuit, may not want to limit *ex parte* communications between the executive and the agency. The executive represents the interests of the entire nation when forming policy, and courts may believe that it is good public policy to allow the executive to heavily influence agency regulations to reflect those national interests. On the other hand, agencies, as the purported experts in their respective fields, should not be responsive to the political whims of the day, but should instead issue regulations solely based on the statutory requirements. Courts may also realize the efficiency that *ex parte* communications have. The President’s power to remove agency administrators, if exercised every time the administrator’s policies did not match the executive’s policy objectives, would be a huge waste of government resources. Instead of constantly removing and replacing agency administrators, the executive can instead act as a “thumb on the scale” when agencies decide whether to promulgate regulations.

Because courts review agency action with such a high standard,¹⁵⁰ and may not believe it is good public policy to interfere with the communications between the executive and an agency, it is unlikely that any substantial limits on executive *ex parte* communications will be imposed by the judiciary.

B. Legislative Limits Imposed on Ex Parte Communications

The most obvious way to limit executive influence on administrative agencies via *ex parte* communications is for “Congress [to] simply limit OMB’s role in regulatory review across the board, or with regard to a particular regulatory program.”¹⁵¹ Congress likely will not make such a dramatic change in administrative procedure, since OMB has

149. Nagareda, *supra* note 2, at 615.

150. See generally Bruff, *supra* note 25.

151. William D. Araiza, *Judicial and Legislative Checks on Ex Parte OMB Influence Over Rulemaking*, 54 ADMIN. L. REV. 611, 626 (2002).

historically been heavily involved in the rulemaking process.¹⁵² Instead of a blanket exclusion of OMB from agency rulemaking, Congress could adopt “a formal rulemaking process for a given regulatory program,”¹⁵³ making ex parte communications unlawful under the Sunshine Act.¹⁵⁴ Congress, again, is unlikely to burden agencies with formal rulemaking procedures since most rulemaking uses the informal procedures. Clearly, the current legislative scheme inadequately prevents ex parte communications, and

[a]ttempting to control ex parte communications by means of prescribing a standard of review, or by requiring that an agency’s decision be based on a particular record, would most likely not end such contacts . . . [because] the evidence can reasonably support widely different conclusions and [] courts defer to the agency’s technical expertise¹⁵⁵

Congress made their intentions clear by not prohibiting ex parte communications when drafting the Sunshine Act.¹⁵⁶ Without an amendment to the Sunshine Act prohibiting such communications, or a tightening of the standards already in place (as discussed above), such communications will continue to occur and no branch of government will likely call in to question the legality of such communications.

C. Executive Limits Imposed on Ex Parte Communications

The executive currently has no self-imposed limits on ex parte communications with agencies. In fact, the executive has set up a mini-agency (OMB) within its bureaucratic structure to specifically engage in such communications.¹⁵⁷ What limits, if any, can be imposed on the executive? The most practical solution would require the executive to do exactly what Congress requires of an agency: publish a document outlining the substance of the evidence presented to it, its response to such evidence, and how it reached its final decision.¹⁵⁸ Such a document will provide, if nothing else, transparency in the decision-making process. In the case study above, the letter from Cass Sunstein to Administrator Jackson provides the reasons for requesting

152. See *Mission of the OMB*, *supra* note 4.

153. Araiza, *supra* note 151, at 627.

154. 5 U.S.C. § 552(b) (2006).

155. Araiza, *supra* note 151, at 628.

156. 5 U.S.C. § 552.

157. See *Office of Management and Budget Meeting Record*, WHITE HOUSE, http://www.whitehouse.gov/omb/oir_2060_meetings (last visited Apr. 16, 2013).

158. When the comment period has ended, agencies must “incorporate in the rules adopted a concise general statement of their basis and purpose.” 5 U.S.C. § 553(c).

the delay of the final rule, but does not divulge the fact that the executive's information in making this decision was supplied by ex parte meetings that had occurred over two months prior.¹⁵⁹ It might have been better policy to explain where the information guiding the executive's decision came from so that it did not appear as though the executive was making unsubstantiated and politically-motivated demands of the agency.¹⁶⁰ While requiring such an explanation from the executive likely will not stop ex parte communications between the executive and agencies from occurring, it will allow the public to understand how the decision was made.

Conclusion

This case study exposes the lack of transparency in informal agency rulemaking caused by ex parte communications with the executive branch. While the government will predictably be hesitant to impose restrictions on these contacts,¹⁶¹ the public should be aware that these communications have substantive influence on the outcome of important regulations. There are many possible solutions to this problem, but requiring the executive to comply with the same standards of transparency expected of an agency during rulemaking seems to be the most practical, efficient, and democratic method. Regulations have a substantial effect on the general public (for example, regulations concerning the quality of air we breathe every day), and the public has the proverbial "right to know" why and how these rules are ultimately shaped and created.

159. Sunstein Letter, *supra* note 1.

160. Because President Obama did not explain why the arguments of the private industry representatives persuaded him, the decision to request delay of the rule was viewed by reporters as a political move, coming "barely an hour after another weak jobs report from the Labor Department and in the midst of an intensifying political debate over the impact of federal regulations on job creation that is already a major focus of the presidential campaign." See Broder, *supra* note 85.

161. By imposing restrictions, members of government would be admitting that ex parte communications are a problem. Government, if history is a clue, will not be quick to acknowledge its problems.